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July 9, 2003

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A-325
Washington, DC 20554

Re: *Verizon Petition for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, CC Docket No. 96-149

Dear Ms. Dortch:

I am writing on behalf of AT&T Corp. in response to Verizon's June 23, 2003 *ex parte* letter and the attached white paper entitled "The Limitation in Section 10(d) Does Not Prevent the Commission from Forbearing from Applying the OI&M Regulations" ("*Verizon Memo*") in the above-captioned proceeding. In these filings, Verizon urges the Commission to take action that section 10(d) of Communications Act, 47 U.S.C. § 160(d), expressly forbids – *i.e.*, to forbear from the rule (47 C.F.R. § 53.203(a)(2)) that forbids a Bell Operating Company ("BOC") from sharing operating, installation, and maintenance ("OI&M") functions with a section 272 affiliate.

Section 10(d) of the Communications Act, entitled "Limitation," provides:

> Except as provided in section 251 of this title, *the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title* under subsection (a) of this section until it determines that those requirements have been fully implemented.

47 U.S.C. § 160(d) (emphasis added). Section 271(d)(3), in turn, explicitly requires that a BOC provide long distance service in accordance with the requirements of section 272. Specifically, the Commission "*shall not approve* the [long distance] authorization requested . . . unless it finds that . . . (B) the requested authorization will be carried out *in accordance with the requirements of section 272* of this title." 47 U.S.C. § 271(d)(3) (emphasis added).

The plain language of section 271(d)(3), accordingly, incorporates "the requirements of section 272" into section 271, and the equally plain text of section 10(d) forbids the Commission to "forbear from applying the requirements of . . . 271" until that statute is "fully implemented" – a demanding standard that Verizon does not even claim to satisfy. The combination of these provisions leads inexorably to the conclusion that the Commission is forbidden to forbear from applying any of the "requirements" of section 272 that have been incorporated by reference into section 271. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (in statutory construction, the first step "is to determine whether the language at issue has a plain and unambiguous meaning" and the inquiry ceases "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent'").

Notwithstanding the statutory text, Verizon asserts that "[t]here is no basis to interpret section 10(d) to incorporate section 272 based on the single reference to section 272 in section 271(d)(3)(B)." *Verizon Memo* at 2. Verizon's argument appears to be that section 271 would have to refer to section 272 more than once to incorporate that provision by reference. Verizon cites no case law to support that remarkable claim. Section 271 does not merely "mention[]" 272; it forbids long distance authorization unless 272's requirements are satisfied. The incorporation is evident, and Congress' meaning is plain.

Verizon next points out that section 271 incorporates section 251(c) by reference and argues that reading section 10(d) consistent with its plain language – to forbid forbearance of section 271 and the requirements of sections 272 and 251(c) that it incorporates – would render superfluous section 10(d)'s direct prohibition of section 251(c) forbearance. *Verizon Memo* at 2. But section 271 does not incorporate all of section 251(c): it incorporates only subsections (c)(2)-(4), (c)(6) thus excluding subsections (c)(1) and c(5).[1] Because Congress intended to preclude the Commission from exercising its forbearance authority in connection with *all* subsections of section 251(c), it could not simply rely on section 271's partial incorporation, but instead was required to make express the prohibition of *any* section 251(c) forbearance.

Moreover, in contrast to its first argument (that only a repeated provision is effective), Verizon's second statutory-construction argument assumes that Congress would not twice ensure the preservation of the key provisions protecting the nascent competition in both

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[1] *See* 47 U.S.C. § 271(c)(2)(B)(i) (referencing section 251(c)(2)); *id.* § 271(c)(2)(B)(ii) (referencing section 251(c)(3)); *id.* § 271(c)(2)(B)(xiv) (referencing section 251(c)(4)). As the Commission has recognized, although section 271 does not directly reference the section 251(c)(6) collocation requirement, that requirement is incorporated because it is a principal means of providing nondiscriminatory interconnection and access to network elements, as required by (c)(2) and (c)(3). *South Carolina 271 Order*, 13 FCC Rcd. 539, ¶¶ 199-202 (1997). Section 271(d)(3), cited by Verizon, simply re-incorporates the provisions of section 251(c) referenced in the section 271(c)(2)(B) "competitive checklist."

local and long distance telecommunications markets. Congress often drafts statutes to make assurance of an important goal "doubly sure," and it is far more sensible to interpret a statute to do so than to ignore its plain language. *Cf. Crandon v. United States*, 494 U.S. 152, 174 (1990) (Scalia, J., concurring) ("superfluous exceptions (to 'make assurance doubly sure') are a more common phenomenon than the insertion of utterly pointless language at the very center of the substantive restriction"); *Williamson v. J.C. Penney Life Ins. Co.*, 226 F.3d 408, 411 (5th Cir. 2000) (same). In any event, however, as explained above, the best reading of the text of the Act does not make section 10(d)'s reference to section 251 duplicative or extraneous.

Verizon next invokes the principle of *inclusio unius est exclusio alterius*, and asserts that the explicit list of exceptions to the Commission's forbearance authority in section 10(d) cannot be expanded to include additional, unnamed exceptions. *Verizon Memo* at 3. This argument simply begs the question, however, because section 272 is incorporated by reference in 271 and is, accordingly, already on the list.

Unable to find any support in the statutory text, Verizon contends that the "structure" of the Act supports its contention that the Commission has forbearance authority with respect to section 272. *Verizon Memo* at 4-7. Specifically, Verizon points out that the Act contains a sunset provision for section 272's separate subsidiary requirement. *Id.* at 6-7 (citing 47 U.S.C. § 272(f)(1)). From this, Verizon concludes that it would have been "nonsensical" for Congress both to allow section 272 to sunset and to bar forbearance with respect to this provision. *Id.* at 7. It is Verizon's reading, however, that is nonsensical. As the Commission has recognized, the sunset provision operates on a state-by-state basis and provides for the elimination of the separate subsidiary requirement *in a particular state* under appropriate conditions (three or more years after 271 authorization).[2] This provision fully addresses the circumstances in which it would no longer be appropriate to apply the requirements of section 272, and there was, accordingly, no need by Congress to authorize any kind of additional forbearance authority – indeed, such an authorization would be wholly superfluous in light of the statutory scheme. It is difficult to imagine a circumstance in which section 272 forbearance would be appropriate, in light of Congress's explicit determination of the circumstances in which section 272's requirements no longer should apply (and should therefore sunset). *See Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524-26 (1989) (a specific statutory provision trumps a more general one).

Verizon's structure argument is also contradicted by section 271(d)(6). That provision, which is entitled "Enforcement of Conditions," mandates that the Commission enforce the "conditions required for . . . approval [of a section 271 application] under paragraph (3)." 47 U.S.C. § 271(d)(6)(A). As noted, subsection (d)(3) incorporates section 272 and, therefore, section (d)(6) expressly requires the "enforcement" of section 272. For these reasons, the Commission cannot forbear from applying section 272 without violating the section 271(d)(6),

[2] *See Section 272 Sunset Order*, 17 FCC Rcd. 26869, ¶ 2 (2002).

which expressly requires the Commission to *enforce* section 272. And as the more specific provision, section 271(d)(6) must be deemed controlling. *See Bock Laundry*, 490 U.S. at 524-26.

Verizon nonetheless insists that, at the very least, the statutory language and structure is ambivalent and then cites legislative history of the 1996 Act that shows that the Commission has the authority to forbear from applying certain statutory requirements once markets have become competitive. *Verizon Memo* at 5.[3] From this unremarkable statement, Verizon jumps to the conclusion that section 10(d) "must be interpreted in light of the broad sweep of section 10 and Congress' clear intent to 'empower[] the FCC to forbear from applying any regulation or provision' of the Act – except where such authority is specifically precluded." *Id.* 4-5. In fact, however, the legislative history cited sheds no light whatsoever on the scope or breadth of the express exceptions to the Commission's forbearance authority.[4] Moreover, "[i]nvocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself, . . . in the end, prevents the effectuation of congressional intent." *Board of Governors, FRS v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986). "[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (emphasis in original).

There is, in fact, no ambiguity in the language of section 10(d) and section 271(d)(3). The Commission may not here forbear from applying section 271's requirements, including those incorporated by reference in section 271(d)(3) – *viz.*, section 272. For these reasons, AT&T respectfully submits that the Commission may not "forbear from a regulatory

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[3] In this connection, Verizon asserts that "the history of section 10 shows a progression from permissive forbearance to mandatory forbearance," citing the initial bill's provision that the Commission could forbear from apply "any regulation or provision of the Act." *Verizon Memo* at 4 & n.3. But the cited history is open to a wholly different and more plausible interpretation – that the history of section 10 shows a progression from authorizing forbearance with respect to any and all requirements to imposing limitations on forbearance, including a flat prohibition on forbearance with respect to sections 251(c) and 271 before they are fully implemented (as well as the additional provisions incorporated by reference therein). Nothing in this history provides any support for disregarding the plain text of section 10(d).

[4] Citing legislative history, Verizon weakly asserts that "at *no* point did any carve-out [from the Commission's forbearance authority] include section 272 or its precursor." *Verizon Memo* at 4 (emphasis in original). This is, of course, irrelevant because the carve-out enacted in the 1996 Act *does* include section 272 (through Section 271). Moreover, none of the legislative history cited even remotely suggests that Congress "carved out" or excluded any part of section 271 (including section 271(d)(3)) from section 10(d)'s forbearance prohibition. The citation to Senator McCain's intention that the Act "[e]nd numerous unnecessary common carrier regulations by requiring mandatory FCC forbearance when markets are deemed competitive" does not identify any particular regulation as unnecessary, let alone the provisions of section 272 incorporated by reference into section 271.

obligation" under section 272(d)(3), as Verizon suggests, *see Verizon Memo* at 3, and that the Commission would not be entitled to any deference, let alone *Chevron* deference, if it attempted to torture the plain language of section 10(d) to allow the result Verizon seeks.[5]

Verizon is also wrong that the Commission has endorsed its flawed reading of section 10(d). *See Verizon Memo* at 7-8. In fact, in the lone precedent that is on point, the Commission interpreted section 10(d) precisely as its plain language dictates. Specifically, the Common Carrier Bureau expressly stated: "[P]rior to their full implementation, *we lack authority to forbear from application of the requirements of section 272* to any service for which the BOC must obtain prior authorization under section 271(d)(3)." *Section 272 Forbearance Order*, 13 FCC Rcd. 2627, ¶ 22 (1998) (emphasis added); *see also id.* ¶ 23 (sections 10(d) and 271(d)(3) "preclude[] [the Commission's] forbearance for a designated period from section 272 requirements with regard to any service for which a BOC must obtain prior authorization pursuant to section 271(d)(3)"). Verizon's long distance service is a "service for which [Verizon] must obtain prior authorization under section 271(d)(3)," and the Commission, accordingly, cannot forbear from application of "the requirements of section 272."

Confining the sole, genuinely relevant case to a footnote, Verizon seeks to put a patina of relevance on the Commission's cases regarding forbearance in connection with "incidental interLATA services." *Verizon Memo* at 7-8. Verizon contends that the Commission "already has recognized that it may forbear pursuant to section 10(a) from enforcing section 272," citing cases in which the Commission has "concluded that it has authority to forbear from applying section 272 to incidental interLATA services falling within section 271(g)(4)." *Id*. Verizon's argument proceeds as follows: section 271(g)(4) authorizes BOCs to provide "incidental interLATA services"; section 272(a)(2)(B)(i) requires a BOC to provide certain "incidental interLATA services" through a separate affiliate; the Commission has exercised its forbearance authority in connection with the latter provision; and therefore, section 10(d)'s bar on forbearance in connection with section 271 does not extend to section 272, despite section 271(d)(3) – which requires "the requested authorization [of long distance services] to be carried out in accordance with the requirements of section 272."

The central, erroneous premise of Verizon's argument is that section 271(d)(3) incorporates *all* of the requirements of section 272 into 271. It does not. Section 271(d)(3) incorporates (and thus shields from forbearance) only those section 272 requirements that relate

[5] After the Supreme Court's decision in *United States v. Mead*, 533 U.S. 218 (2001), it is unclear whether an agency's statutory interpretation in an informal adjudication of the sort at issue here is ever entitled to *Chevron* deference. *See id*. at 230-231 (explaining that *Chevron* deference generally attaches only to "relatively formal administrative procedure[s]" such as "notice-and-comment rulemaking or formal adjudication"); *id*. at 243 (Scalia, J., dissenting) (noting that the majority extends *Chevron* deference only to "relatively formal procedures such as informal rulemaking and formal (and informal?) adjudication").

to the BOCs' provision of interLATA services that require Commission "authorization." Put differently, section 271(d)(3) incorporates only the section 272 requirements that must be satisfied as a prerequisite to long distance authorization under section 271(d). The BOCs are not required to obtain Commission authorization to provide "incidental interLATA services," and thus section 271(d)(3) does not incorporate section 272(a)(2)(B)(i) (the "incidental interLATA services" provision) by reference and forbid forbearance. The *Forbearance Order* recognized this precise distinction:

> [O]ur authority to forbear from [the application of section 272 to a BOC's provision of enhanced 911 services] is not affected by the limitation in section 10(d) of the Act on the Commission's authority to forbear from applying the requirements of section 271 prior to their full implementation. *Although section 271(d)(3) requires the Commission's prior approval of a BOC's application to provide in-region, interLATA service and the criteria for approval include compliance with section 272, prior Commission approval pursuant to section 271(d)(3) is not required, where, as here, the BOCs provide services that are either previously authorized within the meaning of section 271(f) of the Communications Act or incidental interLATA services as defined by section 271(g) of that Act*.

Section 272 Forbearance Order ¶ 2 (emphasis added). The cases cited by Verizon – which permit forbearance of the separate affiliate requirement in connection with "incidental interLATA services" under section 271(g) of the Communications Act – are, consequently, utterly irrelevant to the scope of the exception to the Commission's forbearance authority established in section 10(d). Thus, the only relevant Commission authority reads sections 10(d) and section 271(d)(3) in accordance with their plain language, and the Commission should adhere to its extant reading.

Even if there were any "ambiguity" with regard to whether section 10 allows the Commission to forbear from applying the requirements of section 272 here, the Commission must interpret that ambiguity to forbid such forbearance. This is the case because there is a substantial question whether section 10 is constitutional. In particular, in conferring upon the Commission the power to "forbear from applying" certain provisions of the Communications Act, 47 U.S.C. § 160(a), Congress has arguably conferred upon the Commission the unilateral power to repeal a duly enacted law. As such, there is at least a substantial question whether section 10 violates the Constitution's Presentment Clause, Art. I, § 7. *See Clinton v. New York*, 524 U.S. 417, 436-447 (1998). Moreover, according to the doctrine of constitutional doubt, the Commission *must* interpret statutes in order to avoid presenting such questions. *See, e.g.*, *Bell Atlantic Telephone Co. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) ("[S]tatutes will be construed to defeat administrative orders that raise substantial constitutional questions.");

Williams v. Babbitt, 115 F.3d 657, 662 (9th Cir. 1997) (explaining that courts will not defer to agency interpretations that raise serious constitutional questions).[6]

In the alternative, Verizon asserts that, even if section 10(d) forbids forbearance from section 272, as incorporated by section 271(d)(3), that prohibition applies only to section 272, and not to the Commission's implementing rules. *See Verizon Memo* at 9. Verizon bases its argument on section 10(a), which grants the FCC authority to forbear with respect to "any regulation or any provision of this Act," while section 10(d) bars forbearance with respect to the "requirements of section 251(c) and 271." Verizon's argument is a *non sequitor*. Although 10(a)'s use of the separate terms "regulation" and "provision" clearly supports the inference that these two terms are intended to have distinct meanings, it does not follow at all, as Verizon suggests, that the term "requirement" in section 10(d) must then be read to mean the same thing as "provision" in section 10(a). To the contrary, if anything, this difference in language suggests that the term "requirements" should be read more broadly than meaning only the statutory provision itself.

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[6] The Presentment Clause requires, *inter alia*, that "[e]very Bill . . . . before it becomes a Law" shall have "passed the House of Representatives and the Senate." Art. I, § 7. "[R]epeal of statutes, no less than enactment, must conform with Art. I." *INS v. Chadha*, 462 U.S. 919, 954 (1983). In *Clinton*, the Supreme Court struck down the Line Item Veto Act of 1996 as a violation of the Presentment Clause. 524 U.S. at 436-447. The Line Item Veto Act authorized the President unilaterally to "cancel" certain provisions of statutes in certain circumstances. *Id*. at 436-37. The Court held that such a cancellation had "both the legal and practical effect" of repealing a previously enacted law, and, because it took effect without going through the two chambers of Congress, it was therefore unconstitutional. *Id*. at 438-442. Like the Line Item Veto Act, section 10 arguably confers upon the Commission the unilateral power to repeal a previously enacted law. Section 10 authorizes the Commission to "forbear from applying" certain provisions in duly enacted laws. When the Commission exercises this power, those provisions, like those at issue in *Clinton*, no longer have any "legal [or] practical effect," *id*. at 438. As such, section 10 arguably confers to the Commission the power to "amend . . . Acts of Congress by repealing [portions of them]." *Id*. Indeed, as Chairman Powell has noted, section 10 provides the Commission with "broad authority to . . . sweep away a legislative act." *Ameritech Forbearance Order*, 15 FCC Rcd. 7066 (1999) (separate statement of Commissioner Powell, dissenting). Section 10 not only gives the Commission itself the power not to enforce duly enacted laws, but it also gives the Commission the power to prevent the States from enforcing those laws as well. 47 U.S.C. § 160(e) ("A State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying under subsection (a).") Section 10(e) therefore confirms that the forbearance provision allows the Commission to repeal duly enacted laws, rather than merely to decline to execute them.

Other sections of the Communications Act make clear that Congress used the term "requirement" broadly to include both the "provisions" of the Act *and* the Commission's implementing "regulations." For example, section 252(e)(2)(B) forbids a state commission from approving an interconnection agreement "if it finds that the agreement does not meet the requirements of section 251 of this title, *including the regulations prescribed by the Commission pursuant to section 251 of this title*, or the standards set forth in subsection (d) of this section." 47 U.S.C. § 252(e)(2)(B) (emphasis added). Thus, a "requirement" is clearly, *inter alia*, a "regulation." Likewise in section 251(b)(2), local exchange carriers are obligated to provide "number portability in accordance with the requirements prescribed by the Commission." 47 U.S.C. § 251(b)(2). Again, it is clear that Congress intended "requirements" to include Commission regulations.

In all events, even if there were ambiguity on this point, it has been resolved against Verizon. The Commission has already recognized that the term "requirement" in section 10(d) applies to "statutory provisions" and to "implementing regulations." *Notice of Inquiry, 1998 Biennial Review*, 13 FCC Rcd. 21879, ¶ 32 (1998). The Commission has, therefore, made clear that the OI&M rules implementing section 272 constitute "requirements" of section 272, and thus of section 271(d)(3)(B).[7]

Verizon's assertion that the Commission is always "free" to revisit its original interpretation of section 272 in the OI&M rules, *see* Verizon *Memo* at 10, reveals its actual and inappropriate agenda. In the guise of seeking forbearance that is statutorily forbidden to it, Verizon is really angling for a constructive rule change, without the trouble of filing a petition for notice and comment rulemaking. If Verizon believes that the OI&M rules should be amended, it is free to file a petition, seeking the changes that it desires. But Verizon should not be permitted to distort section 10(d) – and to eliminate the statutory safeguard against the premature lifting of the vital safeguards to competition found in the requirements of section 271 and portions of section 272 – just so that it can invoke a statutory deadline to which it is not entitled.

Last, Verizon argues that its reading of section 10(d) would result in superior policy. *Verizon Memo* at 5-6. That argument is futile in light of the plain language of the statutory provisions. *See, e.g., Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs, Dept. of Labor*, 519 U.S. 248, 259-61 (1997) (refusing to "depart from a plain reading of the statutory language" in order to further the "policies underlying the Act"

[7] Verizon is also wrong that the purposes of section 272(b) could be achieved without the OI&M rules. *See Verizon Memo* at 9. In Paragraph 163 of the *Non-Accounting Safeguards Order*, the Commission observed that "[a]llowing a BOC to contract with the section 272 affiliate for operating, installation, and maintenance services would *inevitably* afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors." *Non-Accounting Safeguards Order*, 11 FCC Rcd. 21905, ¶ 163 (1996) (emphasis added).

because the plain reading was not "absurd or glaringly unjust"). Beyond the clear text, however, there are ample, strong policy reasons to bar forbearance from application of the requirements of section 272.

Verizon draws a distinction between market-opening provisions (sections 251 and 271) and competition-safeguarding provisions (section 272), and argues that it was sensible of Congress "not to permit forbearance from section 271 (or section 251(c)) while permitting forbearance from section 272." *Verizon Memo* at 5-6. But Verizon nowhere explains why Congress would have thought it vital to open markets to competition, but of less urgency to safeguard the competition so difficult to create. In fact, Congress made no such irrational distinction.

Congress enacted the section 272 structural and accounting safeguards in 1996 precisely because it recognized that the unusual market structure in the telecommunications industry made it likely that the BOCs would require oversight, even after markets were opened to competition. Congress recognized that, even after BOCs opened their local markets to competition and received approval pursuant to section 271 to offer in-region long distance services, BOCs would remain dominant in their local markets. It would take significant time for numerous competitors to establish viable and ubiquitous alternative sources of local services that could act to constrain the BOCs' market power, and for local competition to be truly robust. Congress was aware, for example, that AT&T's dominance in the long distance market was not found to have dissipated until eleven years after it completely divested control of the local bottleneck facilities that the BOCs now control. Accordingly, Congress established the section 272 safeguards to apply to BOCs during the time period – however long – that a BOC's market power persists after long distance entry, so that any anticompetitive behavior could be more easily detected and remedied. Indeed, as noted above, Congress provided an entirely separate mechanism – the sunset provision – to address the requirements of section 272 and whether market conditions warrant dispensation with the requirements of section 272.

Local markets are nowhere near the robust competition that Congress intended and that is necessary to dissipate BOC market power. And, as AT&T and others have explained repeatedly, the BOCs indisputably retain substantial local market power. Thus, reading sections 10(d) and 271(d)(3) as written– to bar forbearance of the incorporated provisions of section 272 – is supported by strong policy justifications rooted in the primary purposes and structure of the Communications Act.

* * *

In its Petition, Verizon seeks a waiver of the "crucial[ly] important" requirements of section 272. *Texas 271 Order*, 15 FCC Rcd. 18354, ¶ 395 (2000). Section 10(d) precludes this request unless and until Verizon can show that section 271 – which incorporates the requirements of section 272 – has been fully implemented. Verizon cannot meet that demanding standard and does not even attempt to do so. Its Petition should be denied.

Sincerely,

/s/ David L. Lawson

DLL:amm

cc: J. Carlisle
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